A

GLAMOUR GREEN SDN BHD

v.

AMBANK BHD & ORS & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NOS: W-02-285-2006 & W-02-382-2006]

C

19 MAY 2006

CONTRACT: *Construction - Loan - Plaintiff entered into loan agreement with first defendant in order to pay off balance price of shares purchased by plaintiff from third parties - First defendant released sum*

D

to third parties for said shares - First defendant subsequently sold said shares to second defendant - Whether first defendant entitled to act as it did - Construction of provisions of documents involved in transaction - Principles applicable

E

CONTRACT: *Shares, sale of - Entitlement to sell - Plaintiff entered into loan agreement with first defendant in order to pay off balance price of shares purchased by plaintiff from third parties - First defendant released sum to third parties for said shares - First defendant subsequently sold said shares to second defendant - Whether first defendant entitled to*

F

act as it did - Construction of provisions of documents involved in transaction - Principles applicable

CONTRACT: *Construction - Approach to question of construction - Plaintiff entered into loan agreement with first defendant in order to pay off balance price of shares purchased by plaintiff from third parties - First*

G

defendant released sum to third parties for said shares - First defendant subsequently sold said shares to second defendant - Whether first defendant entitled to act as it did - Construction of provisions of documents involved in transaction - Principles applicable

H

BANKING: *Securities for advances - Loan - Plaintiff entered into loan agreement with first defendant in order to pay off balance price of shares purchased by plaintiff from third parties - First defendant released sum to third parties for said shares - First defendant subsequently sold said shares to second defendant - Whether first defendant entitled to act as it*

I

did - Construction of provisions of documents involved in transaction - Principles applicable

CONTRACT: *Loan - Construction - Plaintiff entered into loan agreement with first defendant in order to pay off balance price of shares purchased by plaintiff from third parties - First defendant released sum to third parties for said shares - First defendant subsequently sold said shares to second defendant - Whether first defendant entitled to act as it did - Construction of provisions of documents involved in transaction - Principles applicable*

These were two appeals, one by the plaintiff and the other by the second defendant in the counterclaim being the second and third defendants to the main action, concerning a transaction involving the shares of a public limited company, one Ladang Perbadanan Fima Bhd ('LPF'). On 6 August 2004, the plaintiff entered into two agreements, one with Kumpulan Fima Bhd ('Fima') and the other with Amalan Kontrak (M) Sdn Bhd ('Amalan'). The Fima agreement related to the purchase by the plaintiff of 26,496,000 shares while under the agreement with Amalan, the plaintiff agreed to purchase 10,028,000 shares. Pursuant to certain clauses common to both agreements, it was amply clear that the property in the subject shares were to pass to the plaintiff only upon completion of the procedures therein. Upon execution of the agreements, the plaintiff paid 10% of the purchase price amounting to 13.8 million to both Fima and Amalan, with the balance to be paid on or before 6 December 2004 in accordance with cl. 3.1 of the Sale and Purchase Agreements. The plaintiff did not have all that money with it and had to raise the rest. On 30 November 2004, the plaintiff entered into a Loan Agreement with the first defendant. There were other accompanying documents of even date, these being the Memorandum of Deposit and Charge over Securities, a Power of Attorney, a Personal Guarantee, Members and Directors resolutions of the plaintiff and the Purchase Undertaking executed by the second defendant. In his judgment, the learned judge focused his attention almost entirely on the Purchase Undertaking, an approach that was criticised by the plaintiff in this appeal. On 8 December 2004, the first defendant released a sum of RM99.5 million to Fima and Amalan for the LPF shares, which completed the transaction between the plaintiff and Fima and Amalan. The property in the LPF shares vested in the plaintiff and, on 14 December 2004, the plaintiff wrote a letter to the first defendant by the terms of which it sought to redeem the LPF shares by paying off the loan and interest. The first defendant, however, informed the plaintiff that it had sold the LPF shares to the second defendant. On 16 December 2004, the

plaintiff issued a writ and, on the same date, obtained an *ex parte* injunction to restrain the defendants from dealing with the shares. After a trial, the High Court found against the plaintiff, dismissing its claim and entering judgment in terms of the counterclaim brought by the defendants. These appeals were directed against those orders. The main issue to be determined in these appeals was whether the first defendant was entitled to sell the LPF shares to the second defendant.

Held (allowing the appeals)

Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is a settled principle that where more than one document or instrument is involved in a transaction, courts usually construe those documents together (*Mohd Isa & Ors v. Abdul Karim & Ors* (foll)). So, it followed that the documents mentioned must be read together and it was the combined effect of those documents that this court was concerned with in order to ascertain the intention of the parties in this case. Therefore, there was merit in the plaintiff's complaint that the learned judge was wrong in the approach he took by focusing solely upon the Purchase Undertaking. (paras 7, 8 & 9)

(2) Looking at the loan documents as a whole, the critical question was whether the Purchase Undertaking was part of the security given by the plaintiff to the first defendant or whether it was an independent document upon which the first defendant could act in disregard of the other instruments forming part of the loan documents. If it was an independent and a "non-security" instrument, that is to say, it was not intended to be a security, then the first defendant was entitled to act as it did. However, the Purchase Undertaking must be read together with the other instruments comprising the loan documents and, if upon such a reading, the objective conclusion to be arrived at was that the Purchase Undertaking was nothing more that a mere additional security, then the first defendant would not have been entitled to sell the LPF shares to the second defendant. (para 23)

(3) In the present instance, however, the provisions in the different instruments forming part of the same transaction were not entirely consistent. First, there was the Loan Agreement that said that the plaintiff must settle and repay the loan on

or before 8 January 2005. Against this, the Purchase Undertaking said that the LPF shares must be redeemed by 30 December 2004. In another instance, cl. 11.1 of the Loan Agreement said that the first defendant was entitled to sell without qualification. Compare this with cl. 10.1 of the same document which said that the loan was repayable upon demand. In a third instance, which had to do with the first defendant's power of sale, on the one hand, you have cl. 7 of the Memorandum of Deposit and Charge over Securities that empowered the first defendant to sell only in the event of default and on the other, cl. 11. 1 of the Loan Agreement which, as already mentioned, conferred upon the first defendant an unqualified power of sale. (para 32)

(4) In the face of such inconsistencies, the approach to the issue of construction should be to place such an interpretation on the loan documents as would give effect to the objectives and purpose of the transaction. Interpreting the loan documents against the factual matrix forming the background in this case, it was abundantly clear that the purpose of the Purchase Undertaking was to serve as a security for the loan advanced by the first defendant to the plaintiff. Here was a situation where there was an additional fact. If the Purchase Undertaking were to be treated as a separate non-security instrument, it would mean that the plaintiff had agreed to a sale of the LPF shares to the first and second defendants at a loss to itself of over a sum of RM35 million. Approached from the standpoint of a reasonable businessman, this would lead to an absurd result. As such, it could not have been the intention of the parties that the Purchase Undertaking was to stand alone as a non-security document. Put another way, this additional fact pointed to an intention on the part of the plaintiff and the first defendant to treat the Purchase Undertaking as part of the security offered by the plaintiff to the first defendant for the loan. (paras 33, 34, 35, 36, 37 & 38)

(5) Based on the relevant authorities and applying the principles they have laid down to the facts and circumstances of the present instance, it was not the objective intention of the parties to the loan documents that the first defendant should be entitled to sell off the LPF shares to the second and third defendants or indeed to anyone else, before 8 January 2005.

It followed that the first defendant having had no authority to sell the shares could pass no title to the second and third defendants. *Nemo dat quod non habet.* The sale by a non-owner of goods to a third party is void (*Hollins v. Fowler* (refd)). Since the first defendant had no title to pass to the second defendant, the latter acquired no title to the LPF shares. Therefore, the learned judge was wrong in finding for the defendants and for the reasons already given, these appeals must be allowed. (paras 42 & 43)

[Order accordingly.]

Bahasa Malaysia *translation of headnotes*

Kedua-dua rayuan di sini, yang dikemukakan oleh plaintif dan defendan kedua dalam tuntutan balas di mana mereka masing-masing adalah defendan kedua dan ketiga dalam guaman utama, menyentuhi suatu transaksi mengenai saham-saham sebuah syarikat awam berhad, Ladang Perbadanan Fima Bhd ('LPF'). Pada 6 Ogos 2004, plaintif memeterai dua perjanjian, iaitu satu dengan Kumpulan Fima Bhd ('Fima') dan satu lagi dengan Amalan Kontrak (M) Sdn Bhd ('Amalan'). Perjanjian dengan Fima adalah mengenai pembelian 26,496,000 saham oleh plaintif, sementara dalam perjanjian dengan Amalan, plaintif bersetuju membeli 10,028,000 saham. Berdasarkan satu fasal yang wujud di kedua-dua perjanjian, jelas bahawa harta pada saham-saham berkenaan akan hanya berpindah kepada plaintif apabila prosedur-prosedur mengenainya disempurnakan. Setelah memeterai kedua-dua perjanjian, plaintif membayar 10% harga belian atau RM13.8 juta kepada kedua-dua Fima dan Amalan, sementara bakinya akan dibayar pada atau sebelum 6 Disember 2004 berdasarkan fasal 3.1 Perjanjian-Perjanjian Jual Beli. Plaintif tidak mempunyai dana yang mencukupi dan terpaksa mencari pembiayaan dari sumber lain. Pada 30 November 2004, plaintif memeterai satu Perjanjian Pinjaman dengan defendan pertama. Selain itu, terdapat beberapa dokumen bertarikh sama yang di meterai oleh defendan kedua, seperti Memorandum Deposit dan Gadaian ke atas Jaminan, resolusi Ahli-Ahli dan Pengarah-Pengarah plaintif, serta Akujanji Pembelian. Dalam penghakimannya, yang arif hakim menumpukan hampir sepenuh perhatian kepada Akujanji Pembelian, dan pendekatan ini telah dikritik oleh plaintif di rayuan ini. Apapun, pada 8 Disember 2004, defendan pertama membayar sejumlah RM99.5 juta kepada Fima dan Amalan untuk saham-saham LPF,

sekaligus menyempurnakan transaksi di antara mereka. Berikutnya, harta di dalam saham-saham LPF telah berpindah kepada plaintif, dan pada 14 Disember 2004 plaintif menulis kepada defendan pertama menyatakan hasrat untuk membayar balik pinjaman dan faedahnya dan menebus saham-saham LPF berkenaan. Defendan pertama bagaimanapun memberitahu plaintif bahawa ia telah menjual saham-saham LPF kepada defendan kedua. Pada 16 Disember 2004, plaintiff mengeluarkan writ, dan di hari yang sama memperoleh injunksi *ex parte* menghalang defendan-defendan dari berurusan dengan saham-saham. Di perbicaraan, Mahkamah Tinggi menolak tuntutan plaintif dan membenarkan tuntuan balas defendan-defendan. Rayuan-rayuan di sini adalah terhadap perintah-perintah yang dibuat oleh Mahkamah Tinggi tersebut, dan isu utama yang berbangkit adalah sama ada defendan pertama berhak untuk menjual saham-saham LPF tersebut kepada defendan kedua.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Sudah menjadi prinsip mantap bahawa di mana transaksi itu melibatkan lebih dari satu dokumen atau instrumen, maka mahkamah akan mentafsirkan dokumen-dokumen secara bersama (*Mohd Isa & Ors v. Abdul Karim & Ors* (diikuti)). Ianya mengikut bahawa dokumen-dokumen yang dinyatakan harus ditafsir secara bersama, dan apa yang dipentingkan mahkamah dalam menentukan niat pihak-pihak adalah kesan keseluruhan dokumen-dokumen tersebut. Oleh itu, terdapat merit pada rungutan plaintif bahawa yang arif hakim khilaf dalam pendekatan yang diambilnya, iaitu bilamana beliau menumpukan sepenuh perhatian kepada Akujanji Pembelian semata-mata.

(2) Melihat kepada dokumen-dokumen pinjaman secara keseluruhan, soalan penting yang berbangkit adalah sama ada Akujanji Pembelian merupakan sebahagian dari jaminan yang diberi oleh plaintif kepada defendan pertama atau sama ada ia satu dokumen yang bebas dan tersendiri yang boleh dijadikan sandaran oleh defendan pertama tanpa perlu mempeduli dokumen-dokumen lain yang turut mendokong perjanjian-perjanjian pinjaman. Jika ia satu instrumen bebas 'bukan-jaminan', iaitu tidak diniatkan sebagai satu cagaran atau jaminan, maka defendan pertama berhak bertindak seperti yang

dibuatnya. Bagimanapun, Akujanji Pembelian hendaklah dibaca bersekali dengan instrumen-instrumen lain yang menjadi dokumen perjanjian, dan jika konklusi objektif yang terhasil dari pembacaan sedemikian adalah bahawa Akujanji Pembelian tidak lebih dari hanya satu jaminan tambahan, maka defendan pertama tidak berhak untuk menjual saham-saham LPF kepada defendan kedua.

(3) Apapun, dalam kes ini, peruntukan-peruntukan dalam instrumen-instrumen yang menjadi sebahagian transaksi yang sama tidak semuanya konsisten. Pertama, terdapat Perjanjian Pinjaman yang menyatakan plaintif perlu menyelesaikan dan membayar balik pinjaman sebelum atau pada 8 Januari 2005. Di sebalik itu, Akujanji Pembelian menyatakan bahawa saham-saham LPF hendaklah ditebus sebelum 30 Disember 2004. Selain itu, fasal 11.1 Perjanjian Pinjaman menetapkan bahawa defendan pertama berhak menjual tanpa syarat, manakala fasal 10.1 dokumen sama menyatakan bahawa pinjaman mesti dibayar sebaik ia dituntut. Disebalik semua ini, terdapat keadaan ketiga, yang berkaitan dengan kuasa defendan pertama untuk menjual, di mana fasal 7 Memorandum Deposit dan Gadaian ke atas Jaminan membenarkan defendan pertama menjual jika berlaku kemungkiran, sementara fasal 11. 1 Perjanjian Pinjaman, seperti yang dikatakan di atas, memberi kuasa menjual tanpa syarat kepada defendan pertama.

(4) Mengambilkira semua ketidak-konsistenan ini, pendekatan yang harus diambil terhadap isu pentafsiran ialah dengan memberi tafsiran kepada dokumen-dokumen pinjaman dengan cara yang akan memenuhi tujuan dan objektif transaksi. Mentafsir dokumen-dokumen perjanjian berlandaskan gugusan fakta yang menjadi latarbelakang kes di sini jelas menunjukkan bahawa tujuan Akujanji Pembelian adalah supaya ia dijadikan sebagai satu jaminan kepada pinjaman yang diberikan oleh defendan pertama kepada plaintif. Ini adalah situasi di mana suatu fakta tambahan wujud. Sekiranya Akujanji Pembelian dianggap sebagai satu instrumen bukan-jaminan, ianya bermakna bahawa plaintif bersetuju untuk menjual saham-saham LPF kepada defendan pertama dan kedua pada kadar yang akan menyebabkan kerugian kepadanya sebanyak lebih RM35 juta. Dilihat dari kacamata seorang peniaga munasabah, ini mencetuskan satu rumusan yang bodoh. Oleh itu, ianya bukanlah tujuan pihak-pihak bahawa Akujanji Pembelian tersebut wujud secara tersendiri sebagai satu dokumen bukan-

jaminan. Dengan lain perkataan, fakta tambahan ini menunjuk kepada niat di pihak plaintif dan defendan pertama untuk menganggap Akujanji Pembelian sebagai sebahagian dari jaminan yang ditawarkan oleh plaintif kepada defendan pertama untuk pinjaman.

(5) Berdasarkan autoriti-autoriti relevan dan menggunapakai prinsip-prinsip mereka kepada fakta dan halkeadaan kes semasa, bukanlah menjadi niat pihak-pihak kepada dokumen-dokumen perjanjian bahawa defendan pertama berhak untuk menjual saham-saham LPF kepada defendan kedua atau kepada sesiapa pun, sebelum 8 Januari 2005. Ianya mengikut bahawa, oleh kerana defendan pertama tidak berhak untuk menjual saham-saham tersebut, maka ia tidak boleh memindahkan sebarang hakmilik kepada defendan kedua dan ketiga. *Nemo dat quod non habet.* Penjualan barangan oleh seorang yang bukan pemilik kepada mana-mana pihak ketiga adalah batal (*Hollins v. Fowler* (dirujuk)). Oleh kerana defendan pertama tidak mempunyai hakmilik untuk dipindahkan kepada defendan kedua, pihak terkemudian tersebut tidak mendapat apa-apa hakmilik kepada saham-saham LPF. Yang arif hakim, dengan itu, khilaf dalam membuat keputusan yang memihak kepada defendan-defendan. Atas alasan-alasan yang diberi, rayuan-rayuan harus dibenarkan.

[Perintah sekadarnya.]

Case(s) referred to:

Antaios Compania Noviera SA v. Salen Rederierna AB [1985] 1 AC 191 ***(refd)***

Bank of Credit and Commerce International SA v. Munawar Ali [2001] 2 WLR 735 ***(refd)***

G Percy Trentham Ltd v. Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25 ***(refd)***

Hollins v. Fowler [1875] Law Rep 7 HL 757 ***(refd)***

Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98 ***(refd)***

Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***

Mars Equity Sdn Bhd v. Tis "Ata" Ashar Sdn Bhd [2005] 1 CLJ 513 CA ***(refd)***

Mohamed Isa & Ors v. Abdul Karim & Ors [1970] 2 MLJ 165 ***(foll)***

Neuchatel Asphalte Co Ltd v. Barnett [1957] 1 WLR 356 ***(refd)***

Pacific Century Regional Development Ltd v. Canadian Imperial Investment Pte Ltd [2001] 2 SLR 443 ***(refd)***

Legislation referred to:
Sale of Goods Act 1957, ss. 2, 27

Other source(s) referred to:
Chitty on Contracts, 28th edn, vol 1, p 604, para 12-045

(Civil Appeal No: W-02-285-2006)
For the appellant - K Kirubakaran (Max Yong, S Malar, Hariharan Tara Singh, Wan Shahrizal Wan Ladin with him); M/s Wan Shahrizal, Hari & Co
For the 1st respondent - Dato' Ahmad Redza Abdullah (Wan Azmir Wan Majid with him); M/s Shahrizat Rashid & Lee
For the 2nd & 3rd respondents - Dato' Loh Siew Cheang (Ranjit Singh, Gregory Ling & Kelvin Seet with him); M/s Ranjit Ooi & Robert Low

(Civil Appeal No: W-02-382-2006)
For the appellant - Paul Ong (SS Soo & Olivia Ho with him); M/s Paul Ong & Assoc
For the 1st respondent - Dato' Ahmad Redza Abdullah (Wan Azmir Wan Majid with him); M/s Shahrizat Rashid & Lee
For the 2nd & 3rd respondents - Dato' Loh Siew Cheang (Ranjit Singh, Gregory Ling & Kelvin Seet with him); M/s Ranjit Ooi & Robert Low

[Appeal from High Court, Kuala Lumpur; Suit No: D4-22-1805-2004]

Reported by Suresh Nathan

JUDGMENT

(Oral)

Gopal Sri Ram JCA:

[1] This is the judgment of the court. For convenience, we will refer to the parties according to the titles assigned to them in the court below. There are two appeals before us. One is by the plaintiff. The other is by the second defendant in the counterclaim being the second and third defendants to the main action. The facts relevant to the appeal are as follows.

[2] Ladang Perbadanan Fima Berhad, or LPF for short, is a public limited company. It is listed on the stock exchange. This case concerns a transaction that has to do with the shares of LPF. This is how the story began.

[3] On 6 August 2004, the plaintiff entered into two agreements. One was with Kumpulan Fima Berhad, or Fima. The other was with Amalan Kontrak (M) Sdn. Bhd., or Amalan. The Fima agreement related to the purchase by the plaintiff of 26,496,000 shares. Under the agreement with Amalan, the plaintiff agreed to purchase 10,028,000 shares. The purchase price was the same under both agreements. It was RM3.80 per share. We find it unnecessary to reproduce the whole of those two agreements in this judgment. Suffice for the present purposes that we refer to one or two important clauses in them. These clauses are common to both agreements, so we will produce them only once. First, there is cl. 3A.4 which reads as follows:

> 3A.4 The parties hereto acknowledge, confirm and agree that the property, right, title and interest to the Sale Shares shall pass and only vest in the Purchaser upon the completion of the procedures contemplated in Clause 3.1 of this Agreement and subject further to payment of the Purchase Price to the Vendor on or before the Payment Date and/or payment to the Vendor of all other money (if any) due to the Vendor under this Agreement being fully and completely paid to and settled with the Vendor in accordance with this Agreement.

[4] Next there are cls. 4.1 and 4.2 which deal with what happens in the event of the plaintiff's default. This is what they say:

> 4.1 In the event that the Purchaser fails to pay the Balance Purchase Price in accordance with Clause 3.1 above, the Vendor shall be entitled to forfeit the Deposit for the Vendor's account as agreed liquidated damages for the non-performance of the Purchaser's obligations under this Agreement. Pursuant to the foregoing purpose, the Purchaser hereby authorises the Stakeholders that upon the Stakeholders' receipt of a written notice from the Vendor, to release to the Vendor the Deposit, together with all interest earned thereon, if any, for the account of the Vendor as agreed liquidated damages payable to the Vendor in respect of the Purchaser's breach of its obligations under this Agreement and simultaneously thereto the Stakeholders shall return the Resignation Letters to the Vendor.
>
> 4.2 The Purchaser further agrees that upon the Purchaser's failure to pay and settle the Balance Purchase Price in accordance with Clause 3.1 above, the Vendor shall be at liberty to sell or dispose of the Sale Shares or any part thereof either together or in parcels, to any other party or parties, either by dealings with any

A broker or by public or private sale or private treaty or in such other manner for such consideration and upon such terms and conditions as may be determined by the Vendor at their sole and absolute discretion provided however that nothing herein contained shall be construed as rendering it obligatory on the Vendor to ensure that the Sale Shares are sold as aforesaid.

B

[5] On a plain reading of the aforesaid clauses, it is amply clear; indeed, there has been no argument advanced to the contrary; that the property in the subject shares were to pass to the plaintiff only upon completion. On execution of the agreement, the plaintiff C paid 10% of the purchase price amounting to RM13.8 million to both Fima and Amalan. The balance was to be paid on or before 6 December 2004 in accordance with cl. 3.1 of the sale and purchase agreement. The plaintiff did not have all that money with it. It had some. It had to raise the rest.

D

[6] On 30 November 2004, the plaintiff entered into a loan agreement with the first defendant. There were other accompanying documents of even date. These were the Memorandum of Deposit and Charge over Securities, a Power of E Attorney, the Personal Guarantee of one Affendi bin Mohd Fuad Stephens, Members and Directors resolutions of the plaintiff and the Purchase Undertaking executed by the second defendant. In his judgment, the learned judge focused his attention almost entirely on the Purchase Undertaking. This approach has been the F subject of criticism by the plaintiff in this appeal. We think it is appropriate at this stage to deal with this part of the case.

[7] It is a settled guiding principle that where in a transaction more than one document or instrument is involved, courts usually G construe those documents together. The point was made by Raja Azlan J in *Mohamed Isa & Ors v. Abdul Karim & Ors* [1970] 2 MLJ 165 in a language that cannot be rivalled. This is what Raja Azlan J (as His Royal Highness then was) said:

> H It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one. This principle was followed in *Idris bin Haji Mohamed v. Ng Ah Siew, supra,* where Terrell J. at page 261 said:
>
> > I It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the

> parties, and it is a corollary from this that the intention must be gathered from the documents as a whole. It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards v. Marcus* [1894] 1 QB 587 (see also the dissenting judgment of Fletcher Moulton LJ in *Manks v. Whiteley,* which was approved on appeal to the House of Lords, sub-nominee *Whiteley v. Delaney* [1914] AC 132).
>
> In the present case, the two said permits to mine referred to the same subject matter and were substantially in identical terms except that the second permit was to take effect only a year later, that is, after the first permit had expired. In the circumstances, the two permits to mine should be read together as forming one permit to mine for a period of two years.

[8] This passage was recently applied by this court in *Mars Equity Sdn. Bhd. v. Tis "Ata" Ashar Sdn. Bhd.* [2005] 1 CLJ 513.

[9] So it follows that all the documents we have just mentioned must be read together. It is the combined effect of these documents that we are concerned with in order to ascertain the intention of the parties in this case. We are therefore of the view that there is merit in the plaintiff's complaint that the learned judge was wrong in the approach he took by focusing solely upon the Purchase Undertaking.

[10] The next event was this. On 8 December 2004, the first defendant released a sum of RM99.5 million to Fima and Amalan for the LPF shares. That completed the transaction between the plaintiff on the one side and Fima and Amalan on the other in accordance with cl. 3A.4 already quoted above. The property in the LPF shares vested in the plaintiff. Then on 14 December 2004 the plaintiff wrote a letter to the first defendant by the terms of which it sought to redeem the LPF shares by paying off the loan and interest. By a letter of even date the solicitors for the first defendant informed the plaintiff that the LPF shares had been sold by the first defendant to the second defendant.

[11] On 16 December 2004, the plaintiff issued a writ and on the same date obtained an *ex parte* injunction to restrain the defendants from dealing with the shares. On 11 April 2005 that injunction was by consent extended until the trial of the action. After a trial at which witnesses were called, the High Court found

against the plaintiff and dismissed its action. It also entered judgment in terms of the counterclaim brought by the defendants. These appeals are directed against those orders.

[12] The first issue to be determined in these appeals – and this is common ground amongst all parties before us – is whether the first defendant was entitled to sell the LPF shares to the second defendant. That issue must be resolved by reference to the true construction to be placed upon the documents executed in the first defendant's favour and referred to earlier in this judgment. In order to address our mind to these all important questions, we must harken to some of the important provisions in what we will compendiously call the loan documents, by which of course we mean the documents earlier referred to. Here are some of the important provisions.

[13] First, the loan agreement. Under this document the plaintiff had to repay the loan by the repayment date which is defined as follows:

> … the date falling one (1) month from the full drawdown of the Facility or upon receipt of the LPF Sale Shares Consideration, whichever shall be the earlier

That would mean that the plaintiff was obliged to repay its loan on or before 8 January 2005.

[14] The other provision in the loan agreement is cl. 10.1 which makes the loan payable on demand in the following terms:

> In consideration of the Bank agreeing at the request of the Borrower to grant and make available and continuing to grant and make available the Facility to the Borrower, the Borrower hereby agrees, covenants and undertakes that notwithstanding anything contained in this Agreement, the Facility together with interest and all monies due and payable under this Agreement and/or under any other Security Documents are repayable and payable by the Borrower and the other Security Parties UPON DEMAND by the Bank in accordance with the provisions of this Agreement and until such demand is made the Loan shall be repaid to the Bank in one lump sum on the Repayment Date.

[15] It is not the first defendant's case that a demand was in fact made upon the plaintiff in this case. This is a factor which must be taken into consideration when addressing the other circumstances in this case.

[16] Next is cl. 11 which authorises the first defendant to sell off the LPF shares. This is what cls. 11.1, 11.2 and 11.3 say:

> 11.1 The Borrower hereby irrevocably and unconditionally authorises and requests the Bank to enter into a sale arrangement to effect the sale of the LPF Sale Shares to the LPF Sale Shares Purchaser for the LPF Sale Shares Consideration as agent of the Borrower. The terms of sale shall be determined by the Bank at its discretion and the Borrower hereby confirms and agrees that the same shall be binding on the Borrower.
>
> 11.2 The LPF Sale Shares Consideration shall be applied towards settlement of the Indebtedness and thereafter the balance if any will be paid to the Borrower or such person entitled thereto.
>
> 11.3 Notwithstanding the foregoing, it is hereby expressly acknowledged and agreed by the Borrower that the principal obligation of the Borrower to repay the Advance in full on the Repayment Date shall be absolute and unconditional. The agreement of the Bank to enter into the sale arrangement with LPF Sale Shares Purchaser does not absolve the Borrower from its principal repay the Advance on the Repayment Date in the event the sale cannot be completed for any reason whatsoever.

[17] The final provision in the loan agreement is cl. 18.1.23 which reads as follows:

> 18.1 Each of the following events and occurrences shall constitute an Event of Default under this Agreement:
>
> 18.1.23 if:
>
> (a) LPF Sale Shares Purchaser shall fail to perform or comply with any of its obligations under the LPF Sale Shares Purchase Undertaking or attempt to terminate or renege on any of its undertaking under the LPF Sale Shares Purchase Undertaking;
>
> (b) the acquisition of the LPF Sale Shares under the LPF Sale Shares Purchase Undertaking shall not be completed for any reason for whatever reason;
>
> (c) a petition shall be presented or an order be made or a resolution be passed for winding up of LPF Sale Shares Purchaser;
>
> (d) it is or becomes unlawful for LPF Sale Shares Purchaser to perform any of its obligations under the LPF Sale Shares Purchase Undertaking;

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(e) the LPF Sale Shares Purchase Undertaking shall be voided or is alleged by LPF Sale Shares Purchaser to be voided for any reason;

(f) the LPF Sale Shares Purchase Undertaking is not or cease to be legal, valid, binding or enforceable;

B

(g) LPF Sale Shares Purchaser repudiates the LPF Sale Shares Purchase Undertaking or evidences an intention to repudiate the LPF Sale Shares Purchase Undertaking;

C

(h) The Borrower does any act or cause to be done any act which jeopardises the sale and completion of the LPF Sale Shares to the LPF Sale Shares Purchaser or if the Borrower challenges or disputes the sale of the LPF Sale Shares to the LPF Sale Shares Purchaser.

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As may be seen, this clause deals with what will happen if there is a default on the part of the second defendant in honouring the Purchase Undertaking.

[18] The next document is the Purchase Undertaking itself. By this document, the second defendant unconditionally and

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irrevocably agreed to purchase 35 million LPF shares from the first defendant for a sum of RM2.85 per share. Clause 2 of the Purchase Undertaking goes on to say this:

F

> ... in the event that the Sale Shares are not transferred and credited into your/your nominee's securities account on or before 6 December 2004 for any reason, you shall be entitled to terminate and revoke the Sale Shares by notice in writing to us. We confirm that you shall not be liable to us for any losses, damages, costs and/or expenses as a consequence of such termination.

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[19] Clause 4 of the Purchase Undertaking is in the following terms:

H

> We hereby agree to effect settlement of the total Purchase Price of RM99,750,000/- to you or as you shall direct within thirty (30) days from the date hereof ("the Completion Period" and the date of payment of the total Purchase Price shall referred to as "the Completion Date"). We irrevocably and unconditionally authorize AmSecurities Sdn Bhd or such other stockbrokers (acceptable to you) to deal with you directly to effect the transfer of the Sale

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> Shares by way of Direct Business Transaction in accordance with the rules and regulation of Bursa Malaysia Securities Berhad ("BMSM") ("the Direct Business Transaction") within the

Completion Period. For such purposes, we will open a central depository account with such broker acceptable to you and execute all relevant documents and undertakings as may be required by such broker to effect and complete the transfer of the Sale Shares pursuant to the Direct Business Transaction.

Subject to full settlement of the total Purchase Price as aforesaid, and, subject to us obtaining the necessary approvals from BMSB and the regulations on delivery/crossing of securities of the BMSB, you shall affect the transfer of the Sale Shares no later than Three (3) market days thereafter into our securities account or our nominee's securities account.

[20] It is to be noted that this clause refers to a time limit of thirty (30) days from the date of the Purchase Undertaking, which was referred to as the completion date in that document. It follows that based on the Purchase Undertaking, the date on which the LPF shares were to be redeemed from the first defendant was 30 December 2004. However by cl. 14.2 of the Purchase Undertaking, the first defendant was entitled to extend the time for performance.

[21] The next document is the Memorandum of Deposit and Charge over Securities. Clause 7.1 which confers power of sale upon the first defendant is in the following terms:

Power of Sale:

Upon the occurrence of any Event of Default or otherwise upon the failure by the Borrower to comply with any of the Borrower's obligations hereunder or under the Loan Agreement or the other Security Documents or upon the breach or default by the Borrower of any terms and conditions hereunder, it shall be lawful for the Bank at any time or times thereafter during the continuance of this security without any notice to or any further consent or concurrence by the Borrower to sell or dispose the Mortgaged Securities or any part thereof in such manner (including sale by private treaty) and upon such terms and conditions generally as the Bank shall in its discretion think fit and apply the proceeds of sale or disposal in or towards the discharge of the Indebtedness in such manner as the Bank may in its absolute discretion think fit, with any surplus being paid to the Borrower or any other person who may be legally entitled to it. It is hereby agreed that the Bank and/or its nominees shall not in any way be liable for any loss from or through any brokers or others employed in the sale of the Mortgaged Securities or for any loss or depreciation in value of any such Mortgaged Securities arising from or through

A any cause whatsoever in the possession, custody or control of the Bank or the Bank's nominees. The power of sale herein conferred on the Bank shall operate as a variation and extension of the power of sale conferred on a charge by or under any relevant and applicable statutory legislation or other laws but any restriction in
B respect of such power of sale as shall be imposed at any time and from time to time by any such statutory legislation or other laws shall not apply to the power of sale conferred herein.

[22] The point of significance about cl. 7.1 is that it requires the plaintiff to be in default before the power of sale vested in the
C first defendant become exercisable. No such default, be it noted, is required under cl. 11.1 of the loan agreement.

[23] Now looking at the loan documents as a whole, with particular attention being placed on the provisions reproduced
D earlier on in this judgment, the critical question is whether the Purchase Undertaking was part of the security given by the plaintiff to the first defendant or whether it was an independent document upon which the first defendant could act in disregard of the other instruments forming part of the loan documents. If it
E was an independent and a "non-security" instrument, that it to say, it was not intended to be a security, then the first defendant was entitled to act as it did. However, as we have already said, the Purchase Undertaking is to be read together with the other instruments comprising the loan documents. And, if upon such a
F reading the objective conclusion to be arrived at is that the Purchase Undertaking is nothing more than a mere additional security, then the first defendant would not have been entitled to sell the LPF shares to the second defendant.

G **[24]** Before we address our minds to the construction that is to be placed upon the loan documents when read together, it is necessary to remind ourselves of some of the principles governing the construction of agreements and contracts laid down in the cases. We begin by recognizing that there are no rules of
H construction. It is true that at one point in time courts did refer to the principles they applied when interpreting bilateral documents as being "rules". But the modern approach is different. It is set out in *Chitty on Contracts,* (28th edn) Vol 1 p 604, para 12-045:

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> Certain rules of construction have been formulated by the courts. Previously, these rules were applied somewhat rigidly and adhered to tenaciously (even though the application of one rule in preference to another might lead to an opposite result). However, it was pointed out that the modern approach to construction is 'to assimilate the way in which (contractual) documents are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life'. As a result, most rules of construction are nowadays better regarded merely as guidelines or assumptions as to what the court may regard as the normal use of language and which assist judges to arrive at a reasonable interpretation of the parties' intentions, though subject to examination of the relevant circumstances surrounding the transaction. Some rules, on the other hand, such as the contra proferentem rule, are of a different nature in that they are less obviously designed to ascertain the intentions of the parties and are more closely assimilated to 'rules' in the traditional sense.

[25] That it is the objective aim and purpose of the transaction which is critical was recognized by Lord Diplock in *Antaios Compania Noviera SA v. Salen Rederierna AB* [1985] 1 AC 191, where he said, p 201, para. D1:

> While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of the statutes to the interpretation of the private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

[26] In *G Percy Trentham Ltd v. Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, Steyn LJ (as he then was) said this, p 27:

> … in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessman.

We accept that the foregoing comment was made in the context of contract formation. But in our judgment the principle applies with equal force to contract interpretation.

[27] The next case on the subject is *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749. There, Lord Steyn expressed his view in the following terms, p 771:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in they way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach, Lord Greene M.R's judgment in *Hankey v. Clavering* [1942] 2 KB 326 is rigid and formalistic.

[28] Next, there is *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98, a landmark in the field of contractual interpretation. In that case, Lord Hoffmann set down 5 propositions by which courts are to be guided in the environment of contractual interpretation. This is what he said at p 114:

> My Lords, I would say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 3 All ER 237 at 240-242, [1971] 1 WLR 1381 at 1384-1386 and R*eardon Smith Line Ltd v. Hansen-Tangen, Hansen-Tangen v. Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principle by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected by way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and in this respect, legal interpretation differs from the way we interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the documents is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945.

(5) the 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one were to nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly would not have had.

[29] Before we quote from the next authority, we think it useful to note a few points about Lord Hoffmanns' speech in the *Investor*'s case. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the

A background transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.

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[30] That the subjective intention of the parties is wholly irrelevant was recognized by the Singapore Court of Appeal in *Pacific Century Regional Development Ltd v. Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443. When delivering the C judgment of the court, Chao Hick Tin JA, a judge whose judgments are entitled to great respect, had this to say:

> 17. We shall first deal with the question whether the learned judge is correct to have admitted the evidence of Dr. Funk. It is trite law that evidence on factual matrix may be D admitted to assist in the construction of a document: per Lord Wilberforce in *Reardon Smith Line v. Hansen-Tangen* [1976] 3 All ER 570 at 574; [1976] 1 WLR 989 at 995–996.
>
> 18. In *Investors Compensation (supra)* Lord Hoffmann (at 114), E while stating that 'factual matrix' includes 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', expressly said that it is subject to the exception that the law excludes the admission of 'previous F negotiations of the parties and their declarations of subjective intent'.
>
> 19. In *Chitty on Contracts* Vol 1 (28th Ed), the learned authors explain the difference between factual matrix and negotiation/ subjective intent as follows:
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> G
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> > On the other hand, although evidence of the facts about which the parties were negotiating is admissible to explain what meaning was intended, the court is not entitled to look at what the parties to the contract said or did whilst the matter was in negotiation nor are drafts or H preliminary agreements admissible in aid of its interpretation, except where it is sought to rectify the document or to show that the parties negotiated on an agreed basis that the words used bore a particular meaning. Evidence will also not be admitted to show I what were the parties' subjective intentions with respect to the words used. 'The general rule seems to be that all facts are admissible which tend to show the sense

which the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected.' A

20. However, while the learned judge below cited *in extenso* that part of the judgment of Lord Hoffmann in Investors Compensation relating to the scope of 'factual matrix', it would appear that he nevertheless allowed the admission of evidence of negotiation and of the intent of one party to the negotiation. In his affidavit of evidence-in-chief, Dr. Funk gave a detailed account of his discussions with Patrick Cheung on the question of the 'tag-along' rights. He recounted having told Cheung that he wanted a clause which would have the effect that 'if anything good happens to you concerning this deal, let it happen to us as well.' He also gave evidence on the negotiations leading to the drawing up of cl. 11(E). While these, in a loose sense, could be considered to be the background, they are not 'factual matrix' which are admissible in evidence. Such evidence clearly falls within the exception enunciated by Lord Hoffmann, of 'previous negotiations of the parties and their declarations of subjective intent' which should be excluded. Admission of such evidence would undermine the very object of a written agreement. What happened during the course of negotiation is wholly irrelevant unless the relief claimed is for rectification. B C D E F

[31] To conclude our discussion on the authorities, we refer to the seminal judgment of Denning LJ in *Neuchatel Asphalte Co Ltd v. Barnett* [1957] 1 WLR 356. In that case, after referring to the documents which the court was asked to construe; words in a document that were inconsistent with each other; his Lordship said at p 360: G

Those words are inconsistent with the main object and intention of the transaction as disclosed by all the other circumstances of the case. What then is to be done? It is a well settled rule of construction that, if one party puts forward a printed form of words for signature by the other and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, then the court will limit or reject the printed words so as to ensure that the main object of the transaction is achieved. H I

[32] So too here, save that in the present instance, it is not that words in one document, is not consistent here, but it is the provisions in different instruments forming part of the same transaction that are not entirely consistent. Let us remind ourselves what they are. First, there is the loan agreement which says that the plaintiff must settle and repay the loan on or before 8 January 2005. Against this, look at what the Purchase Undertaking says. It says that the LPF shares must be redeemed by 30 December 2004. Take another instance. Look at cl. 11.1 of the loan agreement. It says that the first defendant is entitled to sell without qualification. Compare this with cl. 10.1 of the same document which says that the loan is repayable upon demand. Let us take a third instance. It has to do with the first defendant's power of sale. On the one hand, you have cl. 7 of the Memorandum of Deposit and Charge over Securities which empowers the first defendant to sell only in the event of default. On the other you have cl. 11.1 of the loan agreement which, as we have already said, confers upon the first defendant an unqualified power of sale.

[33] In the face of these inconsistencies, how are we to approach the issue of construction? In our judgment, we should place such an interpretation on the loan documents as would give effect to the objectives and purpose of the transaction. In doing so, we are entitled and will take into account the factual matrix of the background.

[34] Part of the background is the Letter of Offer given by the first defendant to the plaintiff. Paragraph 3 of that letter says that the purpose of the facility made available by the first defendant to the plaintiff is to:

> … part finance (up to 72% of the acquisition cost) the acquisition of 26.496 million and 10.028 million Ladang Perbadanan-Fima Berhad's shares from Kumpulan Fima Berhad and Amalan Kontrak (M) Sdn Bhd respectively at RM3.80 a share.

[35] And para. 4 says that the tenure of the facility is to be:

> up to one month from the date of a full drawdown or expiry of the availability period whichever is earlier.

[36] Although the Letter of Offer refers to the Loan Agreement, the Memorandum of Deposit and Charge over Securities, Power of Attorney and the Guarantee, it makes no reference to the Purchase Undertaking. However, there is another document which is of singular importance that forms part of the background. It is the Internal Memorandum of the first defendant dated 29 November 2004 on which appears a note which reads as follows:

> The downside risk of this transaction not being completed would result in our facility being defaulted. The irrevocable letter of undertaking from KLK provides the bank the first way out. (As at Sept 04 KLK's cash balances were RM636m).
>
> RMD recommends the personal guarantee of Affendi, bin Tun Mohd Fuad Stephens to be obtained to ensure that the transaction is completed.

[37] Interpreting the loan document against this factual matrix forming the background, it is abundantly clear that the purpose of the Purchase Undertaking was to serve as a security for the loan advanced by the first defendant to the plaintiff.

[38] Here is a situation where there is an additional fact. Here we have a case where the plaintiff purchased the LPF shares at RM3.80. If the Purchase Undertaking is to be treated as a separate non security instrument, it would mean that the plaintiff had agreed to a sale of the LPF shares to the first and second defendants at a loss to itself over a sum of RM35 million. Approached from the stand point of a reasonable businessman, this would lead to an absurd result. As such, it could not have been the intention of the parties that the Purchase Undertaking was to stand alone as a non-security document. Put another way, this additional fact points to an intention on the part of the plaintiff and the first defendant to treat the Purchase Undertaking as part of the security offered by the plaintiff to the first defendant for the loan.

[39] Test it objectively. Why would the plaintiff go through the whole process of obtaining the loan from the first defendant to pay for the LPF shares if the intention was to on-sell those shares to the second and third defendants? In this context, it is to be noted that the plaintiff paid the first defendant the sum of RM2.269 million made up of facility fees, upfront deposit and a cash deposit.

[40] Learned counsel for the second and third defendants has strenuously argued that the factual matrix forming the background of the transaction is not to be confined to the loan documents but also to the other documents and circumstances pertaining to the dealings between the plaintiff and second defendant in relation to another block of LPF shares. We were in the course of argument regaled with documents and charts in an attempt to show relevance. However, having closely scrutinized all the documents put before us by learned counsel for the second and third defendants, we are satisfied that based on their pleaded case in the court below and having regard to other contemporaneous documents including the loan documents, the material we have been invited to examine is only relevant to demonstrate the subjective intention of the second and third defendants. It has no relevance whatsoever, in our respectful view, to the objective aim and purpose of the transaction as disclosed by the relevant documents.

[41] We remind ourselves that we are here to interpret the loan documents. It is the factual matrix forming the background to these documents that are relevant provided they satisfy the objective test set out by Lord Hoffmann in the *Investors*' case. We would in this context, reiterate the need for an objective test in the construction of commercial contracts by referring to the speech of Lord Clyde in *Bank of Credit and Commerce International SA v. Munawar Ali* [2001] 2 WLR 735, where he said:

> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[42] Based on the authorities we have thus far discussed and applying the principles they have laid down to the facts and circumstances of the present instance, we are of the view that it was not the objective intention of the parties to the loan documents that the first defendant should be entitled to sell off the LPF shares to the second and third defendants or indeed to anyone else, before 8 January 2005. It follows that the first defendant having had no authority to sell the shares could pass no title to the second and third defendants. *Nemo dat quod non habet*. The sale by a non-owner of goods to a third party is void. See *Hollins v. Fowler* [1875] Law Rep 7 HL 757. This principle is now codified in s. 27 of our Sale of Goods Act 1957. None of the exceptions to s. 27 apply, of course, in this case. And for completeness, we would refer to s. 2 of the Act of 1957 which defines "goods" as including stocks and shares. In this respect, our statute differs from the English equivalent.

[43] Since the first defendant had no title to pass to the second defendant, the latter acquired no title to the LPF shares. We must therefore respectfully but with regret differ with the learned judge's finding for the defendants. We think he was wrong and should have found for the plaintiff. For the reasons already given, these appeals must be allowed.

[44] There shall be judgment as prayed in terms of para. 22.03 (A) of the statement of claim, that is to say, a declaration that the sale and purchase of the disputed resale shares owned by plaintiff in LPF between the first defendant and the third defendant is null and void and of no effect. As the time limited by the loan agreement has since expired, it is necessary that time be extended to enable the plaintiff to effect the redemption. Accordingly, we direct that the time be extended and that the plaintiff do redeem the LPF shares from the first defendant within 30 days from today by the payment of the sum of RM99.5 million. Upon payment of the said sum the first defendant shall return the said LPF shares to the plaintiff together with the loan documents. Parties are generally at liberty to apply to the High Court for such orders for completion. In the event of the plaintiff's default of this order, the first defendant is to be at liberty to act in accordance with the loan documents. We would also award the plaintiff damages for breach of contract to be assessed by the senior assistant registrar of the High Court and that such damages be paid by the first defendant to the plaintiff. The plaintiff will also

A have the costs here and the costs in the court below. The deposit is to be refunded to the plaintiff. All orders made by the High Court are hereby set aside. The defendants' counter-claim in this action is hereby dismissed with costs. A word more about costs. In so far as the plaintiff (FIMA) in Civil Appeal W-02-382-2006
B is concerned, it shall be entitled to recover its profit costs and out of pocket bill and the taxing registrar in the court below shall make no award for getting up in this respect as against all the respondents.

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